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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1491

[Docket No. NRCS-2009-0004]

RIN 0578-AA46

Farm and Ranch Lands Protection Program

AGENCY: Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Final rule amendment; response to comments.

SUMMARY: The Natural Resources Conservation Service (NRCS) published in the Federal Register a final rule for the Farm and Ranch Lands Protection Program (FRPP) on January 24, 2011, to address comments received on the interim rule and to publish changes to the entity certification requirements. At that time, NRCS provided an opportunity for the public to submit comments for 30 days on the certification requirements only. This rulemaking action is necessary to address those comments received on the entity certification requirements.

DATES: Effective date: This amendment is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Steve Parkin, Team Leader, Easement Programs, Easement Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Ave. SW., Room 6807 South Building, Washington, DC 20250; Telephone: (202) 720-1864; Fax: (202) 720-9689;

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Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (Voice and TDD).

SUPPLEMENTARY INFORMATION:

Regulatory Certifications

Executive Order 12866

Pursuant to Executive Order 12866, the Office of Management and Budget (OMB) has determined that this final rule amendment is not significant and will not be reviewed by OMB. The FRPP final rule published on January 24, 2011, is a significant regulatory action, and NRCS conducted an economic analysis of the potential impacts associated with this program. NRCS reviewed the economic analysis prepared for the final rule and determined that the provisions of this amendment do not alter the assessment and the findings that were originally prepared. A copy of the economic analysis is available on the NRCS Web site at:

<http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/analysis>.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this final rule amendment because NRCS is not required by 5 U.S.C. 553, or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Analysis

An environmental assessment (EA) was prepared in association with the FRPP interim and final rule. The provisions of this amendment do not alter the assessment and the findings that were originally prepared. The analysis determined that there would not be a significant impact to the human environment and as a result, an Environmental Impact Statement was not required to be prepared (40 CFR 1508.13). A copy of the EA and Finding of No Significant Impact may be obtained from the NRCS Web site at: <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/analysis>.

Civil Rights Impact Analysis

NRCS has determined through a Civil Rights Impact Analysis that the final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. The provisions of this amendment to the final rule do not alter the assessment and the findings that were originally prepared. A copy of the analysis may be obtained from the NRCS Web site at: <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/analysis>.

Paperwork Reduction Act

Section 2904 of the Food, Conservation, and Energy Act of 2008 (2008 Act) requires that implementation of programs authorized under Title II of the Act be made without regard to the Paperwork Reduction Act of 1995 (Title 44 U.S.C. 3501 et seq.). Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this final rule amendment.

Executive Order 13132

Executive Order 13132 requires agencies to conform to principles of Federalism in the development of its policies and regulations. NRCS has determined that this final rule amendment conforms with the Federalism principles set forth in the Executive Order; would not have impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, NRCS concludes that this final rule amendment does not have Federalism implementations.

Executive Order 13175

This final rule amendment has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this final rule amendment on Indian Tribal Governments and concluded it will not negatively affect Indian Tribal Governments or their communities. This final rule amendment does not have a substantial direct effect on Tribes, as these regulatory provisions do not impose unreimbursed compliance costs nor preempts Tribal law.

Unfunded Mandates Reform Act of 1995

This action does not compel the expenditure of \$100 million or more in any one year (adjusted for inflation) by any State, local, or Tribal Governments, or anyone in the private sector. Therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

The Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994, Title III, section 304, requires that for each proposed major regulation with a primary purpose to regulate issues of human health, human safety, or the environment, USDA is to publish an analysis of the risks addressed by the regulation and the costs and benefits of the regulation. This final rule is not a proposed major regulation, and therefore, a risk analysis was not conducted.

Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)

This final rule amendment is neither major nor significant, and therefore, it is not subject to the SBREFA 60-day requirement. Accordingly, this final rule amendment is effective upon publication in the Federal Register.

Background

NRCS published in the Federal Register on January 16, 2009, an interim rule with request for comment amending the program regulations for FRPP. The interim rule implemented changes to FRPP made by the 2008 Act and made administrative improvements to the program. NRCS published a correction to the interim rule on July 2, 2009, to clarify that the contingent right of enforcement is a condition placed upon the award of financial assistance and, therefore, does not constitute a realty acquisition. That action also reopened the public comment period for the interim rule.

The FRPP final rule was issued on January 24, 2011, to address comments received on the interim rule and to publish changes to the entity certification

requirements. At that time, NRCS provided the public an additional 30 days to comment only on the changes made by the final rule to the entity certification requirements. This rulemaking action is necessary to address comments received on the entity certification requirements during that public comment period.

Responses to Comments and Amendment to Final Rule

NRCS received 27 comments from 7 commenters on FRPP entity certification requirements as set forth in the January 24, 2011, final rule. The commenters addressed both procedural and substantive topics associated with FRPP entity certification. This section of the preamble addresses these comments and NRCS responses. Comments that NRCS received on other topics were not considered in this rulemaking.

Administrative Flexibility

Comment: One commenter expressed support for the administrative flexibility certified entities could receive regarding NRCS oversight of FRPP-funded easement transactions.

NRCS Response: NRCS believes that the administrative flexibility provided by the certification process implements the statutory changes made to FRPP by the 2008 Act. NRCS is taking this opportunity to identify additional administrative flexibility afforded to certified entities. A certified entity may avail itself of post-closing administrative flexibility as well. In particular, § 1491.22(k) of the FRPP final rule identifies that any changes to the easement deed after its recordation must be consistent with the purposes of the conservation easement and FRPP, and any substantive amendments will require NRCS approval. For certified entities, NRCS will deem amendments submitted by

certified entities as approved and will only require the certified entity to provide the NRCS State office a copy of any recorded amendment within 60 days of recording the amendment. NRCS will consider a certified entity's implementation of this administrative flexibility as part of its 3-year certification review cycle and other quality assurance reviews. Any amendment that substantively adversely impacts the conservation values protected by the conservation easement deed may be considered a deficiency in terms of the certified entity's ability to enforce its conservation easement deeds effectively.

Comment: One commenter recommended NRCS not mandate technical reviews of all appraisals, and instead should conduct quality assurance reviews on a sampling of appraisals in conjunction with the title and easement reports for certified entities.

NRCS Response: NRCS has already adopted a practice consistent with this comment in the January 24, 2011, final rule. In particular, § 1491.4(e)(5) states that NRCS will conduct quality assurance reviews of a percentage of the conservation easement transactions submitted by the certified entity for payment. The review will include whether the deed, title review, or appraisals were conducted in accordance with the requirements set forth by NRCS in its certification of the eligible entity or in the cooperative agreement entered into with the certified entity.

NRCS requires industry approved appraisals for every FRPP easement transaction. NRCS performs a technical review to establish that the industry approved appraisal standard and NRCS requirements have been met in the appraisal report. For certified

entities, NRCS will not require technical reviews on every appraisal because certified entities have shown competency in administering the program. However, NRCS has a fiduciary responsibility to the Nation's taxpayers to ensure the program is carried out as authorized and that funds expended meet the program's purpose. In order to ensure that Federal dollars have been spent appropriately, NRCS will conduct a sampling of appraisals to ensure compliance with appraisal standards. No changes were made to the final rule as a result of this comment.

Certification Process

Comment: NRCS received a recommendation that there should be an explicit step in the rule that states NRCS will make a certification determination and notify the eligible entity regarding that decision.

NRCS Response: NRCS agrees that the certification determination and notification are necessary steps in the certification process and will notify an eligible entity of the NRCS certification determination with a letter from the Chief or the Chief's designee.

Accordingly, NRCS has amended § 1491.4(e) to clarify that NRCS will notify entities in writing whether they have met the certification requirements. If certification is denied, an entity may resubmit their certification application after addressing the application deficiencies.

Comment: NRCS received two comments that several of the certification criteria in § 1491.4(d) appeared redundant to the basic entity eligibility criteria in § 1491.4(c), including criteria related to the timely acquisition of easements and adjustment of procedures to meet program purposes.

NRCS Response: No changes were made to the final rule based on this comment. The criteria identified in § 1491.4(d) are not duplicative of the eligibility criteria.

Certification requirements are designed to build upon basic aspects of eligibility in order to provide streamlined acquisition of conservation easements by certified entities.

Easement transactions conducted by certified entities occur with reduced oversight by NRCS. NRCS believes that additional assurance at the time of certification is necessary to ensure certified entities will handle FRPP-funded transactions in an efficient manner that adheres to FRPP requirements.

Comment: One commenter stated that § 1491.4(d)(9) requires a plan for administering easements as "determined by the Chief." This appears to give the Chief unlimited discretion to reject certification requests, suggests uncertainty for the program, and may conflict with State and local land preservation programs' approvals. The commenter argued that there needs to be a way for an entity to judge whether its plan will be found as adequate.

NRCS Response: Given the range of partners in FRPP (over 400), NRCS does not want to circumscribe the content of an entity's plan in regulation. However, NRCS agrees with the commenter that further general guidance would be helpful. Accordingly, NRCS sets forth the following general categories that should be addressed by entities: monitoring frequency and methodology, site visits, enforcement policies, policies related to when to notify NRCS about easement activities, amendment policies, and methods for periodic communication with landowners. NRCS believes that this flexibility works to the benefit of the applicant, allowing the applicant to demonstrate how its particular

stewardship strategy will further FRPP purposes. No changes were made to the final rule as a result of this comment.

Comment: One commenter cautioned that the terms “certified” and “eligible” need to be used carefully. The word “qualified” can be confused with “certified.” Under this section, the respondent suggests that for any entity to become certified, it must be eligible. This same commenter recommended that NRCS not require that a request for certification be submitted in conjunction with a request for FRPP funding.

NRCS Response: NRCS agrees that the terms should be clear and that a certification request does not also require a funding request. Any entity seeking certification must meet the basic eligibility requirements identified in § 1491.4(c) which is currently required under § 1491.4(d)(1). Therefore, NRCS has revised the introductory text to § 1491.4(d) to read as follows: “To be considered for certification, an entity must submit a written request for certification to NRCS, and must:” NRCS has removed the phrases “must be qualified to be an eligible entity and” and “at the time the entity is requesting FRPP cost-share assistance.”

Comment: NRCS received three comments recommending that NRCS utilize the work of the Land Trust Alliance Accreditation Commission (LTAC) to determine whether an eligible entity has met some or all of the FRPP certification criteria, since the LTAC completes extensive reviews of land trusts to ensure that accredited land trusts have the ability to acquire, manage, and hold.

NRCS Response: NRCS is familiar with the accreditation process used by LTAC and agrees with the commenters that in some instances, LTAC accreditation indicates a high level of competency in areas also required by NRCS. Where LTAC criteria meet or

exceed FRPP certification requirements, NRCS will likely determine that an LTAC-accreditation will satisfy those FRPP requirements. However, NRCS also requires that an entity be proficient with the FRPP program and be knowledgeable about FRPP requirements in order to be certified. With respect to those FRPP-specific criteria, each entity will be evaluated by NRCS. No changes were made to the final rule as a result of this comment.

Comments: NRCS received several comments expressing concern about the certification requirement that an entity hold, manage, and monitor a minimum of 25 agricultural land conservation easements and a minimum of 5 FRPP easements. Commenters stated that an entity may have stellar land preservation programs but not meet the agricultural land or numerical requirement because there are fewer farms to enroll. Accordingly, the commenters proposed that waivers should be provided for LTAC accredited land trusts or those entities who have demonstrated through their participation with other organizations or on other land types that they have sufficient conservation easement experience.

Response: As explained in the preamble of the January 24, 2011, FRPP final rule, NRCS based the minimum 25 agricultural land conservation easement requirement upon data from the Land Trust Alliance 2005 National Land Trust Census Report. In particular, NRCS looked at acres owned and under easement by land trusts, the number of land trusts, and the average size FRPP easement. This figure represents the average number of easements held by land trusts, and therefore, serves as an indicator of entity capacity and stability. NRCS recognizes that this number can vary widely between States and regions. Entities with less than 25 easements may be demonstrating high standards in easement acquisition, management, and monitoring. Therefore, NRCS also incorporated a waiver

provision in § 1491.4(d)(3) of the January 24, 2011, final rule, allowing entities to be certified even if they do not have the requisite minimum 25 agricultural land conservation easements. However, there is no waiver provision for the requirement that entities hold five FRPP easements. NRCS believes a certified entity should be familiar with FRPP and its requirements before receiving the benefits of certification, and the requirement that the certified entity holds a minimum of five FRPP-funded easements is a fair and reasonable threshold demonstrating such familiarity.

Closing Efficiency

Comment: NRCS received several comments urging NRCS to utilize as its closing efficiency element whether an entity is able to consistently close on its easement within 18 months of the signing of the cooperative agreement. These commenters requested clarification on when NRCS begins measuring the 18 months and asked NRCS to only consider the time for aspects of the process that are within the entity's control. The commenters also identified that because parcel substitutions are allowed, adding or removing projects from a pending offer list should not affect the determination of closing efficiency so long as the majority of parcel transactions on the final list are completed within 18 months.

NRCS Response: NRCS will base closing efficiency upon the time from the execution date of the cooperative agreement or amendment, and the closing date of the easement transaction funded under that cooperative agreement or amendment. The 18-month closing efficiency standard for certification is based upon the current closing efficiency requirement set forth in the FRPP cooperative agreements. NRCS calculates an average

completion time for each funding year, and then averages the past 5 years together. The 5-year period of calculation provides an average that mitigates against concerns related to the timing of substitute parcels. NRCS will not remove substituted parcels from these closing efficiency calculations. NRCS has encountered situations where an eligible entity has allowed initial easement transactions to languish and then requested extensions to the cooperative agreement to conduct activities associated with substitute parcels. While allowance for substitute parcels is necessary, the abuse of this practice results in the inefficient use of Federal funds or staff resources. To ensure fairness in situations where NRCS may have contributed unnecessarily to the delay, NRCS will allow an entity seeking certification to request a waiver of the 18-month closing efficiency requirement. The NRCS State Conservationist will make a recommendation to the Chief based on the information in the waiver request. No changes were made to the final rule to implement this administrative flexibility.

Cooperative Agreements

Comment: NRCS received two comments recommending that the provisions for certified entities be applied retroactively to any cooperative agreements approved since adoption of the changes made by the 2008 Act.

NRCS Response: NRCS is applying the certification provisions to cooperative agreements entered into by NRCS and the certified entity in fiscal year (FY) 2011 or later. The agency has chosen this date because in FY 2011, all partners were required to execute new agreements with the revised cooperative agreement template which incorporated 2008 Act requirements. Choosing this date ensures that all certified entities

will be bound by the same requirements when using FRPP funds. NRCS views this decision to be administrative; therefore, no changes were made to the final rule.

Decertification

Comment: NRCS received one comment recommending that NRCS change an entity's review period to coincide with the renewal of the cooperative agreement. The commenter asserted that a 5-year review period will be more efficient and will provide NRCS with a more complete body of work.

NRCS Response: Section 1238I(h)(3)(A) of the FRPP statute requires NRCS to conduct a review of certified entities every 3 years. This review would occur at least once during the life of the 5-year cooperative agreement. No changes were made to the final rule in response to this comment.

Comment: NRCS received one comment about certified entities that may close on easements without prior review of appraisals, deeds, and title commitment. The commenter asserted that decertification of a certified entity should not be based on the NRCS reviewer's conclusions of deficiencies found in an appraisal report or other aspect of the easement transaction. Another commenter requested clarification regarding the appeal rights of a certified entity that has been de-certified.

NRCS Response: Decertification actions are not initiated based on NRCS identification of any particular deficiency that may be revealed in an appraisal or other review. Rather, decertification of a certified entity is based on the entity's failure to remedy one or more of the deficiencies regarding the criteria in § 1491.4(d) within 180 days of receiving notice of such deficiency from NRCS. Additionally, NRCS will provide guidance to the

certified entity regarding correcting identified deficiencies. The NRCS decertification decision is not a matter subject to a National Appeals Division appeal because it is not an adverse decision affecting the rights of a participant (see 7 CFR part 11). However, the FRPP decertification process at § 1491.4(f)(2) provides entities subject to decertification an opportunity to contest such action within 20 days of a Notice of Decertification. Eligible entities who are not certified may still participate in FRPP.

Dedicated Fund

Comment: Four commenters requested clarification about the NRCS capitalization requirements for the dedicated fund for easement management, monitoring, and enforcement. Two of these commenters recommended that NRCS consider the capitalization guidelines provided by the Land Trust Alliance accreditation process.

Response: NRCS does not want to dictate capitalization requirements for the land trust community. However, as a general guideline based upon standards in the farmland protection community, NRCS identified in the preamble of the final rule that the dedicated fund must have at least \$50,000 for legal defense and \$10,000 per easement for management and monitoring.

Comment: NRCS received several comments asking for clarification about whether certified entities must have a dedicated fund for each easement transaction.

Response: NRCS agrees that a dedicated fund is not needed for each transaction. A certified non-governmental entity may have funds reside in a pool dedicated for the management, monitoring, and enforcement of all easements. No changes were made to the final rule in response to these comments.

Quality Assurance

Comment: NRCS received one comment requesting that NRCS conduct all quality assurance reviews prior to the certified entity closing on the transactions since a pre-closing quality assurance review will allow the certified entity to work through any issues.

NRCS Response: NRCS agrees that a pre-closing quality assurance review has less risk than a post-closing review. However, the purpose of the expanded flexibility available to certified entities under the final rule is to improve the efficiency of easement acquisition activities for those responsible entities with a proven track-record. Through the certification process, NRCS determines the ability of an eligible entity to conduct acquisition activities in accordance with FRPP requirements without pre-closing review of each easement transaction. Additionally, a certified entity may consult with NRCS at any time during the easement acquisition process, but it will not be a requirement. No changes were made to the final rule in response to this comment.

List of Subjects in 7 CFR Part 1491

Administrative practice and procedure, Agriculture, Soil conservation.

For the reasons stated above, the Commodity Credit Corporation amends part 1491 of Title 7 of the CFR as set forth below:

PART 1491—FARM AND RANCH LANDS PROTECTION PROGRAM

1. The authority citation for part 1491 continues to read as follows:

Authority: 16 U.S.C. 3838h-3838i.

2. Amend § 1491.4 by revising the introductory text of paragraph (d) and the introductory text of paragraph (e) to read as follows:

§ 1491.4 Program requirements.

(d) To be considered for certification, an entity must submit a written request for certification to NRCS, and must:

(e) NRCS will notify an entity in writing whether they have been certified and the rationale for the agency's decision. Once NRCS determines an entity qualifies as certified:

Signed this __2nd____ day of _February_, 2012, in Washington, DC.

Dave White,
Vice President, Commodity Credit Corporation and
Chief, Natural Resources Conservation Service.

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